86-828
No. _____

IN THE

Supreme Court of the United States

October Term, 1987

Southwestern Sheet Metal Works, Inc.,
Petitioner,

v.

Semco Manufacturing, Inc.,
Respondent.

Appendix to

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Robin F. Hartmann
Counsel of Record
Noel M. Hensley
James J. Williams
Haynes and Boone
3100 InterFirst Plaza
901 Main Street
Dallas, Texas 75202

Gerald B. Shifrin
5848 Cicacia Circle,
Suite A110
El Paso, Texas 79912

Counsel for Petitioner

November, 1986

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

Southwestern Sheet Metal Works, Inc.,

Petitioner,

v.

Semco Manufacturing, Inc.,

Respondent.

Index to Petitioner's Appendix

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 85-1001

D. C. Docket No. EP-81-CA-228

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff-Appellee,

versus

SEMCO MFG., INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before GEE and GARWOOD, Circuit Judges, and BOYLE*, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is reversed, and

* District Judge of the Eastern District of Louisiana, sitting by designation.

the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

May 5, 1986

ISSUED AS MANDATE: SEP 8 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85 1001

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff-Appellee,

versus

SEMCO MFG., INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion May 5, 5 Cir., 1986, ___F.2d____)

(August 25, 1986)

Before GEE and GARWOOD, Circuit Judges, and BOYLE, District Judge.*

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas Gibbs Gee

United States Circuit Judge REHG-8

*District Judge for the Eastern District of Louisiana, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff-Appellee,

v.

SEMCO MFG., INC.,

Defendant-Appellant.

NO. 85-1001
OPINION

Filed May 5, 1986

Before: Thomas Gibbs Gee and Will Garwood, Circuit Judges, and Edward J. Boyle, District Judge.*

Opinion by Judge Thomas Gibbs Gee

Appeal from the United States District Court
for the Western District of Texas
Lucius D. Bunton, III, District Judge, Presiding

SUMMARY

Antitrust

Appeal from a district court judgment based on a finding that defendants had conspired to restrain competition causing injury to plaintiff's business. Reversed and remanded.

Southwestern Sheet Metal Works, Inc. (Southwestern) and Semco Mfg., Inc. (Semco) both manufacture pipe and fittings used in air conditioning duct systems. Southwestern had a manufacturing facility in El Paso, Texas, when Semco moved into the area. Before Semco made the move, however, its president and a local union's business manager negotiated a pre-hire agreement that granted Semco more favorable worker ratios than competitors in the area, including Southwestern. Southwestern thereafter filed suit in district court alleging that Semco and the

*Edward J. Boyle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

union manager had conspired to give Semco labor terms that would put Semco at a bidding advantage over its competitors. The alleged fact of injury included profits from the projects that Southwestern lost because Semco underbid it. Southwestern calculated the amount of damages using time-series data in an econometric model that predicted the effect on its profits of a disparity in wage rates. The jury relied on this estimation procedure to find actual damages of $205,952. On appeal, Semco contends that the district court erred in denying Semco's motion for a directed verdict because Southwestern allegedly failed to prove the fact of injury.

[1] To obtain damages for an antitrust violation, a plaintiff must establish, among other things, the fact of injury: that is, the plaintiff must establish that a violation proximately caused injury to his business. [2] The fact of injury Southwestern claims to have established includes the foregone profits from bids it lost to Semco because Semco used a lower composite wage in determining its bids and, on bids Southwestern did win, the lower profits it realized due to the lower markup it could use when competing with Semco. [3] Based on an economic model, Southwestern's expert witness testified that with the wage advantage, Semco almost uniformly had a lower bid than Southwestern, and that without the advantage, Semco would have placed some bids that would have been higher than Southwestern's. [4] However, even if that economic analysis were accepted, the expert could not conclude that Southwestern would have received any particular bid. There is nothing in the record to indicate that of all bids submitted, Southwestern would have won a bid but for Semco's advantage; Southwestern's proof completely ignores all other bidders. [5] Nor is there evidence that Semco's wage advantage exerted such influence on other competitors' bidding that Southwestern had reduced profits. In short, Southwestern's evidence calls for speculation, and the district court therefore erred in denying Semco's motion for a directed verdict.

OPINION

THOMAS GIBBS GEE, Circuit Judge:

This is an antitrust case involving one firm's claim that a new-entrant competitor and a union's business manager

combined or conspired to restrain competition in violation of Sherman §1[1]. Defendant Semco Mfg., Inc. ("Semco") appeals from a final judgment entered for plaintiff-appellee Southwestern Sheet Metal Works, Inc. ("Southwestern"). We reverse.

I.

Southwestern and Semco both manufacture spiral pipe and fittings used in air conditioning duct systems. Before and during 1981, Southwestern had a manufacturing facility in El Paso, Texas. In 1980, Semco, which had plants in Missouri and Virginia, was considering the El Paso area as a site for a new plant. To that end, Semco's president and Henry Mesa ("Mesa")[2] negotiated a pre-hire union agreement in October 1980. The relevant provisions of that agreement granted Semco more favorable worker ratios than competitors in the El Paso area enjoyed. Specifically, on products receiving union labels other firms had to employ 3 journeymen, 1 apprentice, and no production workers. Under the terms of the October 1980 agreement, Semco could have 3 journeymen, 1 apprentice, and 3 production workers. Because production worker wages were less than those of journeymen and apprentices, this had effect to reduce Semco's average composite wage rate for products it sold in competition with Southwestern.

Southwestern learned the terms of the October 1980 agreement in mid-May 1981. Southwestern's contract with the Union expired on June 30, 1981 and, having learned the terms of the Semco agreement, Southwestern demanded parity in any new agreement. Briggs, who replaced Mesa after Local 188 merged with Local 49 in April 1981, refused to give parity by extending the Semco terms to Southwestern, but tried to give Southwestern parity by cancelling the Semco agreement.

---

[1] 15 U.S. C. §1

[2] At that time, Mesa, a co-defendant in this action, was the business manager for Local 188 of the Sheet Metal Workers International Association. In April 1981, Local 188 merged into Local 49 from Albuquerque. After the merger, Mesa was charged with mishandling Union funds and impropriety in connection with the Semco agreement. After a hearing before the executive board of Local 49, Mesa was expelled from the Union. Mesa is not before the Court in today's appeal.

Claiming that it was threatened with having the Union pull out if if did not concede before its contract expired, Southwestern signed a standard form agreement under protest. The disparity in employment and wage requirements was later resolved when Semco and the Union signed a revised contract.

In its complaint, Southwestern alleged that Semco and Mesa conspired to give Semco labor terms that would put Semco at a bidding advantage over its competitors. The alleged fact of injury included profits from the projects Southwestern lost because Semco underbid it. Southwestern calculated the amount of damages using time-series data in an econometric model that predicted the effect on its profits of a disparity in wage rate. The jury relied on this estimation procedure to find actual damages of $205,952.

On appeal, Semco contends that the trial court erred (1) in submitting the antitrust conspiracy issue to the jury; (2) in denying Semco's motion for a directed verdict based on Southwestern's alleged failure to prove the fact of damage; (3) in refusing to submit the labor exemption issue to the jury; (4) in submitting the damage issue to the jury; and (5) in admitting evidence that the Union tried and convicted Mesa of embezzlement and improper conduct. Because the fact of damage issue is dispositive here, we limit our review to it.

II.

[1] Semco contends that the district court erred in refusing to grant its motion for a directed verdict based on Southwestern's alleged failure to establish fact of injury. As we held in *M.C. Manufacturing Co., Inc.,v. Texas Foundries, Inc.*,517 F.2d 1059, 1063-64 (5th Cir. 1975), *cert. denied*,424 U.S. 968 (1976), to obtain damages for an antitrust violation, a plaintiff must establish, among other things, the fact of injury: that is, the plaintiff must "establish that such violation proximately caused injury to his business...." The standard of review controlling our analysis here is whether, viewing the evidence in the most favorable light and with all reasonable inferences drawn most favorably to it, Southwestern produced substantial evidence of injury caused by the alleged violation so that "reasonable and fair-minded men in the exercise of

impartial judgment might reach different conclusions...." *Boeing Co. v Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

[2] The fact of injury Southwestern claims to have established includes the foregone profits from bids it lost to Semco because Semco used a lower composite wage in determining its bids and, on bids Southwestern did win, the lower profits it realized due to the lower markup it could use when competing with Semco. Southwestern attempted to prove the fact of damage primarily through the testimony of an expert economic witness; other evidence came from a former Semco employee, the business manager for Local 49, Southwestern officers, and Southwestern sales slips and records.

[3] Southwestern's expert economist, Roth, undertook a two-part analysis in his fact-of-injury inquiry. As a first step, he developed a model explaining variation in Semco's bid price for, among other periods, October 1980 through August 1981. The independent variables in the model, those hypothesized to explain variation in bids, were the average composite wage, the materials used, and total construction activity. The observations were all Semco bids from its Sunland Park, New Mexico, facility for the period January 1981 through August 1981. From this analysis, Roth determined that his model explained 89.47 percent of all variation in Semco bids. Moreover, Roth determined that the probability that the relationship between the composite wage rate and bids was random was less than 20 percent. Based on these results, Roth failed to reject his hypothesis that there was a systematic relationship between average composite wage and Semco bids. The second step in Roth's analysis involved comparing the bids Semco would have placed had it not had the wage advantage with bids Southwestern placed. To do this, Roth had to estimate the bid Semco would have placed but for the lower wage. He did this by multiplying Semco's actual bid by the product of the elasticity coefficient on the average composite wage variable he had estimated in the first-step model and the percentage difference between Semco's and Southwestern's average composite wage rate. He then compared the estimated Semco bids with corresponding Southwestern bids. Whereas with the wage advantage Semco almost uniformly had a lower bid than Southwestern, without the wage advantage

Semco would have placed some bids that would have been higher than Southwestern's. From this, Roth concluded that Semco's comparative advantage derived from the lower wage affected the competitive environment in the industry and, because it was a competitor, affected Southwestern as well. Absent the wage advantage, Southwestern would have competed more successfully in bidding for projects.

[4] With respect to this economic analysis, Semco argues that, regardless of what Roth may have accomplished, he did not present sufficient evidence of fact of injury. Even if the adjusted Semco bid would have exceeded Southwestern's bid, Roth could not conclude that Southwestern would have received the bid. Besides being less than persuaded by the statistical significance of Roth's estimation results, we agree with Semco's argument. We find nothing in the record to indicate that of all bids submitted, Southwestern would have won the bid but for Semco's wage advantage. Southwestern's proof completely ignores *all other bidders.*

The other evidence that Southwestern points to as establishing the fact of injury likewise falls short. Donald Linss, a Semco budget analyst and controller during the relevant period, testified that Semco relied on the favorable wage rate in calculating bids from the Sunland, New Mexico facility. Semco points out, however, that Linss also testified that Semco did not use production workers in manufacturing spiral duct and fittings and that the favorable wage was therefore not a component in bids on these products. Southwestern next contends that Gary Briggs, the business manager for Local 49, testified about the chaos the Semco agreement was creating in the industry. The record shows that, although Briggs did refer to industry chaos, this had nothing to do with bidding. Instead, the chaos referred to resulted from other firms increasingly demanding the same labor terms from the Union as Semco had gotten. Southwestern finally argues that its officers, Charles Cooper and Jay Washbourne, testified that, during the period when Semco had the wage advantage, Southwestern was not a competitive bidder. We find nothing in Cooper's testimony to support a finding of fact of injury. Nor does Washbourne's testimony reveal that Southwestern lost or was likely to have lost any specific bids to Semco.

Washbourne's testimony suggests only that Semco and Southwestern bid on some of the same projects during the relevant period, some of which Semco won and other of which Southwestern or a third party won; that Southwestern's bids during this period were 10 to 15 percent higher than some winning bids, a situation that changed after Semco lost its wage advantage; and that, by Washbourne's calculations, Semco had to have a wage advantage in its bids if it were to make any profits on the bids it was submitting.

[5] At most, Southwestern's evidence of fact of injury suggests that something happened to Southwestern's profitability during 1981, that Semco was a competitor, and that Semco had an advantageous labor agreement. Not one instance is presented where, but for Semco's wage advantage, Southwestern would have won or was likely to have won. Nor is there evidence that Semco's wage advantage exerted such an influence on other competitors' bidding that Southwestern had reduced profits. Southwestern did not present sufficient evidence to lead reasonable and fair-minded jurors to reach different conclusions; its evidence calls for speculation. The district court therefore erred in denying Semco's motion for a directed verdict.

III.

The district court order granting judgment to Southwestern is REVERSED. This cause is REMANDED with instructions to enter an order of judgment for Semco.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

SOUTHWESTERN SHEET METAL WORKS, INC., Plaintiff	
V.	NO. EP-81-CA-228
SEMCO MANUFACTURING, INC. and HENRY V. MESA, Defendants	

JUDGMENT

The above-captioned cause came on for trial before the court and a jury on August 20, 1984 in the El Paso Division of this Court, and, the issues having been tried and the jury having rendered a verdict in favor of the plaintiff in the amount of $205,952.00 as actual damages, the Court enters its Judgment as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff SOUTHWESTERN SHEET METAL WORKS, INC. do have and recover from defendants SEMCO MANUFACTURING, INC. and HENRY V. MESA the sum of $618,856.00, representing treble damages as provided by law, for which sum the defendants are jointly and severally liable.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff SOUTHWESTERN SHEET METAL WORKS, INC. do have and recover from defendants SEMCO MANUFACTURING, INC. and HENRY V. MESA the sum of

$305,219.25 representing reasonable attorney's fees in the prosecution through trial of this cause, for which sum the defendants are jointly and severally liable.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the event of an appeal to the United States Court of Appeals for the Fifth Circuit, plaintiff be awarded an additional sum of $50, 000.00 representing reasonable attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the event of an appeal to the United States Supreme Court, plaintiff be awarded an additional $25,000.00 as reasonable attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff do have and recover from defendants the sum of $76,854.00 representing reasonable and necessary expenses and costs incurred in the prosecution of this action, for which sum the defendants are jointly and severally liable.

SIGNED and ENTERED this the 7th day of November, 1984.

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

SOUTHWESTERN SHEET METAL WORKS, INC., Plaintiff	
V.	NO. EP-81-CA-228
SEMCO MANUFACTURING, INC. and HENRY V. MESA, Defendants	

ORDER

On this date came on to be considered defendants' motion for Judgment notwithstanding the verdict or, in the alternative, for a new trial. While said motions, and the briefs in support thereof, made for extremely fine reading, the Court declines the invitation of defendants to either disturb the jury verdict, or, set the case for a new trial. Accordingly,

IT IS, THEREFORE, ORDERED that defendants' motion for Judgment notwithstanding the verdict, or, in the alternative, for a new trial be and is hereby DENIED.

SIGNED and ENTERED this the 26th day of November, 1984.

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff,

v. NO. EP-81-CA-228

SEMCO MFG, INC., and HENRY MESA

Defendants

VERDICT FORM

Answer all the following questions from a preponderance of the evidence.

1. Do you find from a preponderance of the evidence that SEMCO and MESA entered into a contract, combination or conspiracy to extend to SEMCO uniquely favorable labor and wage terms and conditions that were not available to the plaintiff, and to thereby place the plaintiff at competitive disadvantage in the spiral pipe and fittings business?

ANSWER: Yes or No.

WE ANSWER: YES

If you have answered question number 1 yes, and only if your have so answered, continue to question number 2.

2. Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, was an unreasonable restraint of trade under the standards given you by the Court in its instruction?

ANSWER: Yes or No.

WE ANSWER: YES

If you have answered question number 2 yes, and only if you have so answered, continue to question number 3.

3. Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, constituted a restraint on interstate commerce involving a substantial amount of such commerce?

ANSWER: Yes or No.

WE ANSWER: YES

4. Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, proximately caused injury to SOUTHWESTERN in its business or property?

ANSWER: Yes or No.

WE ANSWER: YES

DECEMBER 2, 1983
date

John W. Rice
FOREPERSON

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

SOUTHWESTERN SHEET METAL
WORKS, INC.

VS. NO. EP-81-CA-228

SEMCO MFG., INC.
and HENRY MESA

VERDICT FORM

ANSWER THE FOLLOWING QUESTION FROM A PREPONDERANCE OF THE EVIDENCE.

WHAT AMOUNT OF MONEY, IF ANY, DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE FULLY AND FAIRLY COMPENSATES PLAINTIFF FOR ITS DAMAGES THAT WERE PROXIMATELY CAUSED BY DEFENDANTS' VIOLATION OF THE ANTITRUST LAWS?

ANSWER IN DOLLARS AND CENTS, OR NONE.

ANSWER: $205,952.00

JOHN RICE, FOREMAN

AUGUST 23, 1984
DATE

THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA
TITLE 15 - COMMERCE AND TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA
TITLE 15 - COMMERCE AND TRADE

§15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking

in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party ,or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states. (1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any

claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions. For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and (2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.